



CASE NO. 91-238

IN THE UNITED STATES SUPREME COURT

October Term 1991

Ernest E. Riggs, Petitioner

v.

Scrivner, Inc., an Oklahoma
corporation, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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I. QUESTIONS PRESENTED

1. Whether the jury's decision on the petitioner's Section 1981 claim was a final judgment when there had not been a determination on petitioner's Title VII claims?
2. Whether the trial court's granting a new trial was in violation of the Federal Rules of Civil Procedure?
3. Whether the premature notice of appeal divested the District Court of jurisdiction?

II. PARTIES

Ernest E. Riggs
Plaintiff/Appellant/Petitioner

Scrivner, Inc.
Defendant/Appellee/Respondent
Parent - Haniel Corporation
Subsidiary (not wholly owned) -
Scrivner-Food Holdings, Inc.

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IV. OPINIONS BELOW

See Appendix to Petition for Writ of Certiorari

V. GROUNDS FOR JURISDICTION

- (1) Opinion to be reviewed was entered on March 13, 1991, by the United States Court of Appeals for the Tenth Circuit and is published at 927 F.2d 1146 (10th Cir. 1991).
- (2) On June 12, 1991, petitioner was granted an extension until June 26, 1991, to file his petition.
- (3) Petitioner's brief was rejected two times upon presentation, and was finally accepted for filing on or about August 9, 1991.
- (3) Jurisdiction is based upon 28 U.S.C. § 1254(1).

VI. STATUTES

Rule 54, Fed.R.Civ.P.

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A

judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. in the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 59, Fed.R.Civ.P.

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period

may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 10, Rules of the Supreme Court of the United States

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are

special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States Court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but

should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

VII. STATEMENT OF CASE

Petitioner brought this civil rights action alleging reverse discrimination in violation of 42 U.S.C. § 1981 and 42 U.S.C. § 2000(e) on November 18, 1987, seeking back pay and actual and punitive damages. Following the trial on the merits, on June 2, 1987, the jury returned a verdict in favor of the petitioner on the § 1981 claim and the Court made an initial determination in favor of the respondent as to the Title VII claim. Thereafter, respondent filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial as to the

jury's determination on the § 1981 claim. The District Court denied respondent's motions on September 1, 1988. On September 1, the District Court also reversed its initial determination as to the Title VII claim, taking plaintiff's Title VII claim under advisement.

On September 27, 1988, a notice of appeal was filed challenging the District Court's September 1 determinations. No further appellate filings were made by respondent.

On December 7, 1988, respondent filed a motion for reconsideration of the Court's order overruling respondent's motion for judgment notwithstanding the verdict on the basis that the verdict was a result of jury

compromise. On January 18, 1989, the District Court, on its own initiative, entered an order notifying the parties that it would consider ordering a new trial in the case due to the fact that the verdict may have been the result of jury compromise. The parties were notified that the District Court would hear argument on the propriety of such an order.

On February 7, 1989, the District Court entered its order denying respondent's motion to reconsider and, sua sponte, ordered a new trial. The District Court thereafter entered an order nunc pro tunc amending the last paragraph of its sua sponte new trial order.

A new trial was held as to the § 1981 claim starting on July 12, 1989, and continuing through July 13, 1989. On July 13, 1989, the jury returned a verdict in favor of respondent and against petitioner. The District Court then entered judgment in favor of the respondent on the Title VII claim.

Petitioner appealed to the Tenth Circuit the District Court's August 2, 1989 ruling, all previous adverse rulings and the award of costs to the respondent. The Tenth Circuit affirmed the District Court's decision, dismissed the appeal as to sanctions and reduced the award of costs by \$10.00. Petitioner does not seek certiorari as to all the issues presented to the Tenth Circuit.

VIII. SUMMARY OF ARGUMENT

A petition for writ of certiorari is to be granted only when there are special and important reasons to justify review. Petitioner has failed to state any special or important reasons and upon analysis, it is clear that none exist.

No final order had been entered in the case when the Court ordered the new trial, because the issue of Title VII relief had not yet been determined. Therefore, the Court was free under Rules 54 and 59, Fed.R.Civ.P., to order a new trial. The court's granting a new trial was proper and authorized under the Federal Rules of Civil Procedure.

Respondent's premature notice of appeal was ineffective and did not

divest the District Court of jurisdiction. The District Court was, therefore, free to issue the order for new trial.

IX. ARGUMENT

- A. Petitioner has failed to show any special or important reason for this Court to exercise its discretion.

Rule 10, Rules of the Supreme Court of the United States of America, provides that review on writ of certiorari is not a matter of right, but of judicial discretion. A petition will be granted only where there exists special and important reasons for review. The rule recites examples to indicate the character of reasons that will be considered sufficient.

Petitioner, in his summation of argument, asserts that the District Court substantially departed from the accepted and usual course of proceedings and such conduct was improperly sanctioned by the Tenth Circuit.

The Supreme Court has explained:

'Special and important reasons' imply a reach to the problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

The sole basis of petitioner's arguments is that the jury verdict and

denial of the post trial motion rendered a final, appealable judgment. This argument hardly rises to being episodic. Petitioner does not buttress his theory with any facts or reasoning as to why the District Court's grant of a new trial was such an extreme departure from the usual course of judicial proceedings.

He has failed to show any special or important reason for the review and his petition should be denied.

B. There was no final order entered when the District Court ordered a new trial.

Petitioner argues, as he did to the Tenth Circuit, that when the District Court denied respondent's motion for judgment notwithstanding the verdict or, in the alternative, a new trial, the

court entered a final order which started the ten day clock running for purposes of granting a new trial under Rule 59, Fed.R.Civ.P. Petitioner admits that his claim under Title VII had not yet been determined by the court, but asserts that the § 1981 claim was final.

This argument was presented to the District Court and the Tenth Circuit, and both courts determined that there was no final order entered when the court ordered a new trial. To the extent that this issue is a question of fact, this court must afford this finding great weight. National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 98, 82 L.Ed.2d

70, 82, 104 S.Ct. 2948, 2959 fn. 15 (1984).

"'A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' (citations omitted.) Unless there are one or more errors of law inhering in the judgment below, . . . we should affirm it."

Goodman v. Lukens Steel Co., 482 U.S. 656, 96 L.Ed.2d 572, 584, 107 S.Ct. 2617 (1987).

As the District Court and the Tenth Circuit court of appeals ruled, at the time the District Court granted a new trial, no final judgment had been entered in the case because petitioner's claims under Title VII were not yet

determined and no final judgment had been entered by the court or docketed.

A final judgment ends the litigation and leaves nothing for the court to do but execute the judgment. Coopers & Lybrand v. Livesay, 437 U.S. 463, 467, 57 L.Ed.2d 351, 357, 98 S.Ct. 2454 (1978). There is not a final and appealable judgment until all causes of action are disposed of by the trial court. Lamp v. Andrus, 657 F.2d 1167 (10th Cir. 1981); Golden Villa Spa, Inc. v. Health Industries, Inc., 549 F.2d 1363 (10th Cir. 1977), -as amended by Lewis v. B.F. Goodrich Company, 850 F.2d 641 (10th Cir. 1988). To be a final order, determination as to all claims must be made as to liability as well as damages. Liberty Mut. Ins. Co. v.

Wetzel, 424 U.S. 737, 47 L.Ed.2d 435, 96 S.Ct. 1202 (1976).

To be an effective judgment: (1) the judgment must be set forth in writing on a separate document under Rule 58, Fed.R.Civ.P., and (2) the judgment so set forth must be entered in the civil docket as provided in Rule 79(a), Fed.R.Civ.P. It is undisputed that no judgment was so entered in this case.

Pursuant to Rule 54(b), Fed.R.Civ.P., when more than one claim for relief is presented, the court may direct the entry of a final judgment as to one or more but fewer than all claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry

of judgment. In the absence of such a determination and when fewer than all the claims of the parties have been determined, the decisions of the court are subject to revision at any time before the entry of the final judgment. No certification was ever made by the District Court. In deed, the District Court determined that it had not entered any final judgment.

Although petitioner asserts that the § 1981 claim was separate and distinct from the Title VII claim for purposes of finality, he argues that because the first jury verdict under § 1981 was for petitioner, the Court must find liability under Title VII. Petitioner clearly cannot have it both ways.

Petitioner asserts that Oklahoma law provides for several successive final and appealable orders. However, this is not an accurate statement of Oklahoma law and the cases petitioner cites are inapposite. The final order from which an analogous state appeal is to be lodged disposes of all the issues in the controversy. Teel v. Public Service Co. of Oklahoma, 767 P.2d 391 (Okla. 1985). A judgment is the final determination of the rights of the parties in the action. Reems v. Tulsa Cable Television, Inc., 604 P.2d 373 (Okla. 1979). The disposal of a segment of a cause of action is not an appealable judgment. Teel, supra, at 395. However, Oklahoma procedural law is not applicable to the case at hand

which was brought under two federal statutes and adjudicated in federal court. Hanna v. Plummer, 380 U.S. 460, 14 L.Ed.2d 8, 85 S.Ct. 1136, (1965); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 82 L.Ed.-1188, 58 S.Ct. 817 (1938).

Petitioner asserts that the parties have waived the separate documents requirement. This Court has made clear that the parties are free to waive the requirement. The parties did not do so in the case at hand.

In Bankers Trust Co. v. Samuel Mallis, 435 U.S. 381, 55 L.Ed.2d 357, 98 S.Ct. 1117, reh den. 436 U.S. 915, 56 L.Ed.2d 416, 98 S.Ct. 2259 (1978), this Court found a waiver where the District Court and the parties had assumed a final, appealable judgment was entered

and acted accordingly. The District Court and parties herein did the exact opposite.

This Court explained that the waiver theory is applicable to a situation where all other acts necessary for a final order were in place and a party appealed only to discover there had been no separate final judgment entered. Because the result of requiring a separate document would be dismissal of the appeal, followed by a subsequent appeal once the final judgment was entered, the Court would not make the "[w]heels...spin for no practical purpose." Id., at 385, 362.

Determining that a waiver occurred in the case at hand would not serve to expedite an appeal or avoid unnecessary

filings. Application of the waiver theory would require the undoing of the work of the District Court as affirmed by the Court of Appeals.

Additionally, waiver should not apply herein because the case was not otherwise ready for appeal. The Court had not yet ruled as to all causes of action so, pursuant to Rule 54, Fed.R.Civ.P., a final judgment could not be entered, absent special circumstances.

Notwithstanding the above, petitioner did not assert the argument of waiver to the District Court or the Tenth Circuit. Therefore, it is waived and not properly before this Court.

C. The District Court properly entered a sua sponte new trial order under Rule 59(d).

Under Rule 59, Fed.R.Civ.P., the ten day period to grant a new trial on a court's own initiative begins to run from the entry of a final judgment. As discussed above, unless an express determination is made by the court, the final judgment is entered on a separate document once all claims in the action are determined. The court has discretion to revise its interlocutory orders prior to entry of final judgment, which starts the ten day clock running. Anderson v. Deere & Co., 852 F.2d 1244 (10th Cir. 1988), Rule 54(b), Fed.R.Civ.P. All claims were not determined in the case at hand and no final judgment had been entered.

Clearly, the ten day clock had not yet begun to run.

D. A Premature Notice of Appeal does not divest the Court of Jurisdiction.

The timely filing of a notice of appeal does divest the District Court of jurisdiction. Garcia v. Burlington Northern R.R. Co., 818 F.2d 713, 721 (10th Cir. 1987). However, a premature notice filed before entry of a final judgment does not transfer jurisdiction to the Court of Appeals. Acosta v. Louisiana Dept. of Health & Human Resources, 478 U.S. 251, 92 L.Ed.2d 192, 106 S.Ct. 2876 (1986); Art Janpol Volkswagen, Inc. v. Fiat Motors of N.Am., Inc., 767 F.2d 690, 697 (10th Cir. 1985). Because no final order had been entered, the notice of appeal filed

September 27, 1988, was ineffective and did not divest the Court of jurisdiction. Therefore, the entry of the new trial order was proper and the petition should be denied.

X. CONCLUSION

As the District Court and Tenth Circuit Court of Appeals determined, there was no final order entered in this case when the District Court ordered a new trial. Therefore, the new trial order was proper. Similarly, because there was no final and appealable order, the notice of appeal was ineffective and did not divest the court of jurisdiction or its ability to enter the new trial order.


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CERTIFICATE OF SERVICE

I hereby certify that I am counsel of record for the respondent and that on the 6 day of September, 1991, three (c) correct copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed, postage prepaid, to the following:

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